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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1089

LEONARD DUNCAN, ET AL., *Petitioners*,

v.

HAROLD CRANSTON, ET AL., and ALBERT GUILIAN, ET AL., and CLIFFORD M. HARDIN, Secretary of Agriculture, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF RESPONDENTS ALBERT GUILIAN, ET AL. IN OPPOSITION

OPINION BELOW

The Petition correctly states that jurisdiction in this Court rests upon a Per Curiam opinion and judgment of the Court of Appeals entered on July 16, 1970, and reported at 428 F.2d 822. The portions of the District Court decision pertinent to the Petition, which were affirmed by the Court of Appeals, are reported at 290 F. Supp. 785 (1968). The interlocutory matters currently pending in the District Court which are referred to in the "Opinions Below" portion of

the Petition are not a part of the opinion below and thus are not ripe for review by this Court.

JURISDICTION

As will appear further in the Argument of Respondents Guilian, et al. below, it is respectfully submitted, contrary to assertions in the Petition, that the jurisdiction of this Court to consider Questions 3 and 4 presented in the Petition is doubtful in light of the absence of any decision below on these questions. Moreover, these questions are not now ripe for review in view of their pendency before the lower Courts. With respect to Questions 1 and 2 presented in the Petition, the jurisdictional prerequisites are adequately set forth in the Petition.

COUNTERSTATEMENT CONCERNING QUESTIONS PRESENTED

Questions 1 and 2 presented in the Petition set forth and rest upon the proposition that certain stated factual allegations, "and others" which are unstated, were "conclusively" shown in the record below. Those allegations were not only not "conclusively" shown below, but were specifically rebutted in the extensive hearings before the District Court, and were negated by the ultimate findings of fact of the District Court based upon the full record before it. Questions 1 and 2 consequently amount to attacks upon subsidiary and ultimate findings of fact of the District Court which were unanimously affirmed in all respects by the Court of Appeals. Accordingly, only if this Court is prepared to review these findings of fact of the District Court can it approach the remaining aspects of Questions 1 and 2.

Since the Petitioners have not sought, in other than an *ex parte*, informal manner, to participate in the proceedings in the District Court following the decision of the Court of Appeals, and since in any case the matters complained of with respect to those proceedings have not been appealed to the Court of Appeals, this Court would appear to have no jurisdiction to consider Questions 3 and 4. Consideration of those questions would in any event appear to be inconsistent with the orderly administration of justice.[1]

All four questions presented would appear to be inconsistent with the requirements of Rule 23 of this Court's Rules.

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[1] The only questions which could possibly be raised by these petitions relate to the Court of Appeals' holding that

> "Jurisdiction and venue, the propriety of a class action both as to plaintiffs and intervenor-defendants, claims of bias of the Judge, and the questioned adversary nature of the proceedings were all properly resolved by the Court."

In this connection, Respondents Guilian, et al.'s brief below included the following questions in its "Counterstatement of Issues Presented."

> "2. Whether the procedure adopted by the District Court for determining the validity of the various claims of the appellants Duncan, et al., and, more generally, the propriety of the class action orders entered by it, was fair and proper, where provision was made for reasonable notice to all interested parties, and where all interested parties appearing in response to the notice were given full latitude to present their various contentions to the court both in full adversary hearings and in briefs filed thereafter.
>
> "3. Whether the District Court was correct in determining that the case of *Cranston* v. *Hardin* is a genuine adversary proceeding in all respects, and neither collusive nor otherwise improper, and further in determining that it possessed jurisdiction to decide the case upon its merits in all respects, where there was no showing of collusion or other impropriety, where the evidence demonstrated that the case was fully adversary in nature, and where the interests of the plaintiffs' class therein were represented fully, fairly and adequately."

STATEMENT OF THE CASE

The main case and parties in the Courts below

The Plaintiffs below, Respondents Harold R. Cranston, et al., intermediate and distant producers under the nearby farm location differential provisions of the Federal Milk Order for the Connecticut Milk Marketing Order (7 CFR § 1015.72), brought the main case on February 9, 1967, in the United States District Court for the Northern District of New York. Their complaint contended that the Secretary of Agriculture in promulgating the farm location differential provisions in his Connecticut marketing area order exceeded the statutory authority granted him in the Agricultural Marketing Agreement Act of 1937.

On March 9, 1967, Respondent Albert Guilian, et al., nearby producers benefited by the contested provision, were granted intervention on the side of the Defendant Secretary. On the same day, Chief Judge Foley entered a preliminary injunction providing for escrowing of differential monies during the pendency of the action. In early August, 1967, Chief Judge Foley assigned the case to Hon. William H. Timbers, Chief Judge of the United States District Court for the District of Connecticut, who was then sitting by designation in the Northern District. Trial of the case commenced before Judge Timbers on August 10, 1967, at which time the Defendant Secretary introduced into evidence the administrative hearing records on which the Connecticut Order is based. (R. 1161).[2] Thereafter, following delays occasioned by the conflicting

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[2] Throughout this brief, citations of this nature refer to the pagination established in the index to the record below prepared by the Clerk of the District Court.

schedules of the various counsel involved in the case, trial resumed on October 18, 1967, in Albany.

On October 30, 1967, in the course of trial, Judge Timbers entered class action orders pursuant to Rule 23 of the *Federal Rules of Civil Procedure* (1966) finding Plaintiffs Cranston, et al. proper representatives of their class of non-nearby intermediate and distant producers disadvantaged by the operation of the provision in controversy, and Defendant-Intervenors Guilian, et al. proper representatives of the "nearby" producers who receive the full differential. (R. 269, 271).

Following completion of a seven-day trial on October 27, 1967, and extensive briefing on the merits of the case by the parties, the District Court on August 2, 1968, in a decision which is reported at 290 F. Supp. 785 (1968), upheld the legality of the differential provision in all respects. The Plaintiffs then took an appeal to the Court of Appeals. Oral argument on their appeal was held on June 12, 1969. Following the decision of this Court in *Zuber* v. *Allen*, 396 U.S. 168 (1969), and the parties' filing of several memoranda concerning an appropriate remedy in view of that decision, the Court of Appeals, on July 16, 1970, reversed and remanded the case for such proceedings as might be appropriate in the light of *Zuber* v. *Allen*.

The background of the Petition: participation of Petitioners and their counsel in the main case below [3]

The Petition stems from an order entered by the District Court in its Memorandum of Decision after Trial on August 2, 1968 reaffirming its class action orders of October 20, 1967. While the Court's Memorandum of Decision sets forth in some detail the background of this order (Petitioners' Appendix, pp. G2-G8), the relationship of Petitioners and their counsel in the Courts below, Attorney Charles P. Ryan of the bar of the District of Columbia,[4] to this case can perhaps be understood more fully in the light of a series of proceedings involving Petitioners' counsel below which preceded the chain of events traced in the District Court's Memorandum of Decision. The expressed purpose of the Petitioners' counsel filings therein was to transfer or hold up the *Cranston* proceedings pending the determination in the courts of the District of Columbia of the related *Allen* case.

The District Court's findings of fact in enjoining Kenneth H. Herrington and George H. Herrington

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[3] While they doubt the relevance at this juncture of much of Petitioners' lengthy "Statement of the Case," especially those portions dealing with a number of Massachusetts-Rhode Island and Connecticut order distant producers who are not among the present Petitioners and who have in several instances failed to prosecute appeals from allegedly erroneous actions of the District Court, Respondents do believe that a relatively brief description of the participation of Petitioners and their counsel in the case below would assist the Court in evaluating both the legitimacy and the good faith of their extensive and confusing claims.

[4] Although Attorney Charles P. Ryan is not listed as one of the counsel representing Petitioners, he is in the same office and has apparently worked closely throughout this case with Petitioners' Attorneys Edward J. Ryan and John J. Simard, both of whom have participated with him in the representation of Petitioners in the Court below.

from further prosecuting a suit duplicative of the *Cranston* action in the U. S. District Court for the District of Columbia summarize in a concise manner Attorney Ryan's participation in the *Cranston* case prior to the date of the injunction, January 16, 1968. The pertinent findings, Nos. 5-18, are therefore set forth in the Appendix to this brief (Appendix, pp. 2a-5a) and need not be repeated here.

Following entry of the District Court's injunction on January 16, 1968, and in accordance with it, Attorney Ryan withdrew the Herringtons' motion for summary judgment in the District Court for the District of Columbia. On February 14, 1968, he noticed an appeal to the Court of Appeals on behalf of the Herringtons, but subsequently failed to prosecute it in accordance with the applicable procedural rules.

At the time of issuance of the preliminary injunction against the Herringtons, the District Court also dealt with pleadings of Leonard Duncan, one of the present Petitioners, again represented by Attorney Ryan. These pleadings included a "Motion to Dismiss Action, Vacate Class Order and for Other Relief; or, in Alternative, for Judgment"; a "Statement of Material Facts as to Which There Is No Genuine Issue" and a 69-page "Memorandum of Points and Authorities in Support of Motion for Judgment" [5] (R. 455, 456, 479), and were heard by the Court, Attorney Ryan absent, with Respondent Guilian, et. al's "Motion for Preliminary Injunction," on January 8. In an order dated

[5] This memorandum was virtually identical in content to the "Motion for Summary Judgment and for Relief in the Nature of Mandamus" filed on behalf of the Herringtons in the District Court for the District of Columbia on December 13, 1967.

January 15, 1968, (R. 585), the Court accepted the 69-page "Memorandum of Points and Authorities in Support of Judgment" of Petitioner Duncan as a brief on the merits of the case, but denied the remainder of his requests for relief. (R. 585) Once again, an appeal was noticed by Attorney Ryan (on February 14, 1968, R. 654), but not prosecuted in accordance with the applicable procedural rules.

While Attorney Ryan failed to prosecute the February, 1968, appeals of producers Duncan and George and Kenneth Herrington, he did file two lengthy extraordinary writs against the District Court with the Court of Appeals in February and March of 1968. A "Petition for a Writ of Mandamus and/or a Writ of Prohibition and Stay, or, Alternatively, for Suspension of Injunction and Stay of Proceedings Pending Appeal, etc." (No. 32,092) on behalf of Kenneth H. Herrington was denied from the bench after hearing by a panel of the Court of Appeals (Circuit Judges Friendly and Smith and District Judge Gignoux) on February 19, 1968. The Court's denial of a petition for rehearing of this petition on March 1, 1968, was, in turn, followed by a "Petition for a Writ of Mandamus and/or Prohibition and a Stay" (No. 32,151) on March 5, 1968, in which Attorney Ryan attempted in effect to revive long dormant appeals of Russell Allen, et al. from the District Court's action of October 18, 1967 denying them intervention. (See Appendix, p. 3a) This Petition was denied by the Court of Appeals on March 18, 1968. (Circuit Judges Lumbard and Friendly and District Judge Clarie).

It was only at this point in time that Attorney Ryan commenced to file the papers which are the subject of

the present appeals. In late March, acting on behalf of Leonard Duncan and Kenneth Hewitt, both Connecticut market distant producers, Attorney Ryan filed a "Motion for Leave to Intervene Under Rule 24 or to Otherwise Enter the Action Under Rule 23 for Purpose of Taking Deposition, to Move Dismissal of Suit and for Other Related Relief" (R. 671), together with an "Answer of Interveners and Motion to Dismiss Action, for Disposition of Escrow Fund and Other Relief" (R. 680). These pleadings set forth in some detail allegations apparently intended to suggest various improprieties by all parties to the *Cranston* case.

The District Court's order of notice and hearing of April 22, 1968, the hearings and the Court's findings based on those hearings

The District Court's opinion and findings of fact set forth in sufficient detail that Court's action with respect to the Duncan and Hewitt papers (see Petitioners' Appendix G).

Fourteen witnesses testified at the hearings conducted by the Court in May and June of 1968 and numerous exhibits were received by the Court. The trial transcript ran to 575 pages and in excess of 150 pages of briefs and other papers were thereafter filed by the various participants in the hearings.

In its decision handed down on August 2, 1968, the District Court made detailed findings with respect to the issues raised in the May and June hearings, fully reaffirming its earlier class action orders and denying the relief sought by Kenneth Hewitt and Leonard Dun-

can. The Court's opinion and findings are set forth in Petitioners' Appendix G.[6]

Proceedings since the District Court's decision

Petitioners filed a notice of appeal to the Court of Appeals on August 30, 1968 (R. 2554). On July 16, 1970, the Court of Appeals upheld the District Court's determination as to the Duncan and Hewitt claims, stating:

> "Jurisdiction and venue, the propriety of a class action both as to plaintiffs and intervener defendants, claims of bias of the Judge and the questioned adversary nature of the proceedings were all properly resolved by the court." (Petitioners' Appendix C).

A motion for stay of the Court of Appeals' mandate on behalf of Duncan, et al. was denied by the Court of Appeals on September 10, and the mandate subsequently issued.

On October 5, 1970, counsel for Petitioners Duncan, et al. filed a "motion for an extension of time" for the filing of their Petition in this Court. The motion was granted on October 8, 1970 by Mr. Justice Harlan. On December 18, 1970, Petitioners moved this Court for a stay of mandate. The motion was denied by Mr. Justice Harlan on December 19, 1970.

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[6] On July 17, 1968, Attorney Ryan filed, on behalf of Kenneth Hewitt, a motion seeking disqualification of Judge Timbers from hearing the case (R. 988, 990), with a 38-page affidavit of prejudice and bias attached thereto. The Motion was denied by Memorandum Order dated July 26, 1968 (R. 1054), the Court finding it to be legally insufficient, untimely filed, technically insufficient as lacking a proper certificate of good faith by local counsel and "utterly frivolous." This determination was affirmed by the Court of Appeals; no petition for certiorari has been filed and the time for such a petition has expired.

ARGUMENT

Introduction

This case is not an appropriate one for grant of certiorari. There is no conflict with decisions of this or any other court. Petitioners attempt in their Petition to alter the facts of the case and in doing so largely ignore the District Court's extensive findings of fact and discussion of the relevant issues of law. This approach underscores the inapplicability of the assertions of law contained in their papers.

Nor does the Petition present an important federal question. No other cases are cited which might be affected by the disposition of this case by the Courts below. Moreover, Petitioners' extensive attempts to alter the facts below and therefore to alter the ramifications of the lower Courts' decisions only serve to further confirm that the decisions below turn on a close examination of a particular set of facts rather than on an unprincipled departure from the canons of wise adjudication.

Finally, the decision of the Court of Appeals affirming the findings and conclusions of the District Court was correct. It is fully supported by the evidence of record and consistent with relevant precedent.

I. THE COURT OF APPEALS WAS CORRECT IN AFFIRMING THE DISTRICT COURT'S DECISION. THIS CASE IS NOT APPROPRIATE FOR GRANT OF CERTIORARI.

A. The District Court's findings of fact, affirmed by the Court of Appeals, are fully supported by the evidence of record below.

Petitioners, who are members of the Plaintiffs' class in whose favor judgment on the merits has been decreed by the Court of Appeals, complain here with re-

spect to the District Court's findings of fact on jurisdictional and procedural issues raised by them at the District Court level. Those District Court findings were based on extensive hearings before that Court and have been unanimously affirmed by the Court of Appeals. Petitioners' assault on them simply ignores most of the evidence of record in this case and proceeds to exaggerate and distort the significance of a few portions of the record in an attempt to weave again the same fabric of allegations as that firmly rejected by the Courts below. Because of their reliance upon factual contentions unsuccessfully advanced by them in the Courts below, and because of the gross discrepancy between the claims made in the Petition and the proven facts of record, it would appear to Respondents Guilian, et al. that this case is not an appropriate one for certiorari.

Petitioners' claims, throughout this case, have, in fact, gone considerably beyond the bounds of propriety, and boil down to a wholesale and irresponsible assault upon the integrity of both the other parties here and the Courts below. Their continuing attacks upon the District Court amount to little more than a renewal of Petitioner Kenneth Hewitt's now discarded claim that the District Court was biased throughout the *Cranston* proceeding.

It would be a virtually impossible task, even in a full brief on the merits, to deal fully with every claim, allegation, innuendo and misrepresentation to be found in the Petition. It should, however, be observed that the principal targets of Petitioners' onslaught all testified, both on direct and cross-examination, at great length and in detail as to their participation in the case. Petitioners, where they do not ignore this testimony, appar-

ently simply claim it to be untrue and the product of some great conspiracy among the parties. Such an approach is both improper and amounts to an admission that the evidence on any balanced reading does not support their allegations.

B. The lower Court's determinations of law, based upon the District Court's findings of fact, are correct.

The legal issues raised by Petitioners were fully briefed before the Courts below. The proper resolution of these issues was dependent upon the initial resolution of the extensive factual issues raised by the Petitioners below and echoed in their Petition here. The District Court's discussion of the law applicable to the facts found by it is to the point and clearly correct:

> "The Court is fully cognizant that the payment by one side in an action of an opposing counsel's legal fees is a red flag as to collusion. See *United States* v. *Johnson*, 319 U.S. 302 (1943). But in the instant situation, the Association is in a unique position—it is a democratic institution composed of members on both sides of the question and it is duty-bound to serve the interests of all its members for expenses does not give rise to collusion per Association's offer to reimburse any of its members for expenses does not give use to collusion per se. Rather, the question must be whether the Association has in any way acted to control plaintiffs' conduct of the law suit. Cf. *San Francisco* v. *Boyd*, 22 Cal. 2d 685, 140 P. 2d 666 (1943). If the Court thought that there was even the slightest attempt to exert such control, it would not only reverse its class action orders but it would dismiss the entire action. The Court, however, is thoroughly convinced that no such attempt was made, that the proceedings have been of an adversary nature on the highest level, and that plaintiffs have fairly and more than adequately repre-

sented the other members of their class. The Court therefore not only refuses to dismiss this action but reaffirms its decision to permit it to proceed as a class action."

Petitioners rely solely upon the case of *Gardner* v. *Goodyear Dental Vulcanite Co.*, 131 U.S. Append. ciii (1873). This case was fully considered by the Courts below; it was fully briefed by all parties and both the *Johnson* and *Boyd* cases cited by the District Court deal with the *Gardner* rule. *Gardner* bears no factual resemblance to the instant case and thus its rule of law, appropriate in its context, is of no relevance to this case.

C. The procedure adopted by the District Court, which included both notice and hearing, was fair and proper in all respects.

The District Court's order of notice afforded all interested parties due process. The Court's procedure was appropriate and fair. It accorded all interested parties adequate opportunity to ensure that their rights were properly protected.

The primary concern, in considering whether constitutional due process has been observed in a representative action, is to determine whether the members of the class have been in fact adequately represented by the parties who are present. *Hansberry* v. *Lee*, 311 U.S. 32, 42-43 (1940). This requirement is reflected in Rule 23(a) (4), which states that a class action may be maintained where, *inter alia*, "the representative parties will fairly and adequately protect the interests of the class." This constitutional requirement was respected by the Court below in the procedure ordered by it in its order of notice and in the hearings conducted by it thereafter.

II. THE STILL INCOMPLETE REMAND PROCEEDINGS IN THE DISTRICT COURT ARE NOT RIPE FOR REVIEW.

Questions 3 and 4 presented in the Petition constitute attacks on hypothetical prospective actions by the District Court growing out of proceedings presently pending before that Court. The Court of Appeals has directed that these proceedings be conducted in the light of *Zuber* v. *Allen* and presumably the District Court will act in accordance with that direction. In any case, review—or, more accurately, predetermination—by this Court of these proceedings would not appear to lie at this point in time, and, even if it does arguably lie, would not seem consistent with the orderly administration of justice.

While Petitioners apparently claim to have had an *ex parte* conversation with Chief Judge Foley with respect to their participation in the proceedings in the District Court, Respondents are aware of no papers or oral motions seeking intervention or other participation there filed by Petitioners in accordance with the *Federal Rules of Civil Procedure*. There is thus as well considerable question even as to their standing to challenge the remand proceedings in the District Court at this juncture.[7]

It is therefore clear that grant of the Petition with respect to Questions 3 and 4 presented in it would be inappropriate.

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[7] The representative parties below have advised the District Court that they intend to notify all members of the opposing classes of the terms of any proposed final judgment in the case, and to provide them with an opportunity, at hearing, to present any questions or objections concerning such judgment to Chief Judge Foley. Petitioners will therefore be allowed to present any criticisms they may have of such judgment, including any provision for legal fees, to the District Court.

CONCLUSION

For the foregoing reasons, the Petition should be denied in all respects.

Respectfully submitted,

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January, 1971

APPENDIX

APPENDIX A

Excerpts from Findings of Fact in Support of Preliminary Injunction Issued by District Court January 16, 1968

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Civil No. 67-CV-38

HAROLD R. CRANSTON, DALE R. FRENCH, HELMER A. CARLSON, ROY E. OTTMAN, GEORGE MESICK, JR., and DAVID B. PHILLIPS, Individually and on behalf of all other persons in their class who are similarly situated and affected, *Plaintiffs*,

v.

ORVILLE L. FREEMAN, Secretary of Agriculture of the United States, *Defendant*,

ALBERT GUILIAN, GROVER C. ATWOOD and A. J. MALNATI, *Defendant-Interveners*.

PRELIMINARY INJUNCTION

This cause came on to be heard on Defendant Interveners' motion for a preliminary injunction, and the Court having considered the verified motion, having received in evidence and considered certain copies of documents relating to the case of *Herrington and Herrington v. Freeman*, United States District Court, District of Columbia, Civil Action No. 2681-67 (Defendant Interveners' Exhibits 1-12), having considered testimony heard during the trial of this case relevant to the issues here presented, having received and considered the "Objections to Rule to Show Cause" of Kenneth H. Herrington and George H. Herrington, and having heard argument upon the issues in open court, neither the attorney for the said Herringtons nor the Herringtons themselves having appeared in court despite notice to the said Herringtons and to their attorney as to the time and place of hearing of the Motion for

Preliminary Injunction, (the plaintiffs Herringtons having indicated in their "Objections to Rule to Show Cause" (final page) their desire for "the submission of this paper in the absence of the *Herrington* plaintiffs and their counsel for oral argument"), the Court makes the following

FINDINGS OF FACT

• • • • • • • • • • •

5. On August 10, 1967, trial of the present action was commenced before the Court (Timbers, J.). The trial was adjourned the same day and subsequently scheduled to recommence on October 18, 1967.

6. On October 10, 1967, a motion for leave to intervene for the purposes either of filing a motion to transfer this case to the District of Columbia, or, in the alternative, to hold the action in abeyance, was filed on behalf of Applicants for intervention, Russell Allen, et al., individually and as representatives of their class of approximately 6,600 milk producers similarly situated who produce and sell their milk under the Massachusetts-Rhode Island Milk Order, 7 C.F.R. § 1001, et seq., by Attorney Charles Patrick Ryan of the District of Columbia. The motion was assigned for argument by this Court at 2:30 p.m. on October 18, 1967.

7. On October 18, 1967, at 10:30 a.m., Attorney Ryan appeared before the United States Court of Appeals for the Second Circuit in New York City in support of a "Motion for Order Preserving Status Quo or for Relief in Nature of Prohibition" on behalf of Applicants, Russell Allen, et al. in which was sought an order preserving the status quo pending appeal in the event of an adverse decision with regard to the motions for intervention, etc., then before this Court, or in the alternative, an order prohibiting resumption of the trial of this action pending determination of said appeal.

8. On the morning of October 18, 1967, the said "Motion for Order Preserving Status Quo or for Relief in Nature

of Prohibition" was dismissed by the United States Court of Appeals for the Second Circuit for lack of jurisdiction.

9. On the afternoon of October 18, 1967, the said motions for leave to intervene, and for transfer, or alternatively, stay of Applicants Russell Allen, et al., were denied by this Court for reasons set forth at length in a memorandum decision of this Court.

10. On the afternoon of October 18, 1967, the said trial of the case of *Cranston* v. *Freeman* was resumed. The parties were at issue on seven separate days and extensive testimony and documentary evidence was presented to this Court. (T. 1-941). During the course of the said proceedings, the Court, on October 20, 1967, entered an order that the action be maintained by the Plaintiffs as a class action, and be defended by the Defendant Interveners as a class action. Upon completion of trial on October 27, 1967, a time schedule for completion of the transcript and filing of briefs was established.

11. Pursuant to this Court's directions, Plaintiffs' main brief was filed on or about December 8, 1967, and Defendant and Defendant Interveners' briefs were filed on or about December 22, 1967.

12. On October 18, 1967, Kenneth H. Herrington and George H. Herrington, two producers producing and selling milk produced on their respective farms to handlers operating under the order regulating the handling of milk in the Connecticut Milk Marketing Area, 7 C.F.R., § 1015.1, et seq., whose farms are located outsides of the area described in 7 C.F.R., § 1015.72(a), by said Attorney, Charles Patrick Ryan, filed, in the United States District Court for the District of Columbia, a complaint challenging the validity of the same "nearby" or "farm location" differential provision at issue in the present case. In their complaint, the Plaintiffs, Herringtons, claim to act individually and also for the benefit of all persons in their class. The result of the foregoing is that a case styled *Herrington and Herrington* v. *Freeman*, United States District

Court, District of Columbia, Civil Action No. 2681-67, essentially identical to the present case, is now proceeding in that court.

13. On December 4, 1967, Defendant Freeman filed, in the case of *Herrington and Herrington* v. *Freeman*, a motion to dismiss or stay that action pending determination of the *Cranston* case.

14. On December 13, 1967, Plaintiffs George H. Herrington and Kenneth H. Herrington filed a "Motion for Summary Judgment and/or for Relief in the Nature of Mandamus" in the case of *Herrington and Herrington* v. *Freeman*, together with a "Statement of Material Facts as to Which There is No Genuine Issue", and a 62 page memorandum in support of said motion.

15. On December 14, 1967, Plaintiffs George H. Herrington and Kenneth H. Herrington filed an opposition to the Defendant Freeman's "Motion to Dismiss or in Alternative for a Stay". Said Herringtons in their opposition represented that "the Plaintiffs and their attorney were not allowed to participate in *Cranston*" (p. 4). Said Plaintiffs, Herringtons, have never applied to this Court for purposes of intervention or other participation, nor have they filed any papers with it, except in response to this Court's order to show cause of December 29, 1967. Counsel for said Plaintiffs, Charles Patrick Ryan, has been aware of the *Cranston* action at least since May 16, 1967, and had, prior to December 14, 1967, participated in this action only as counsel for Applicants for intervention, Russell Allen, et al., as more fully appears above, and further, by filing of an appeal from this Court's denial of Applicants' Russell Allen, et al. motion to intervene to the Court of Appeals for the Second Circuit.

16. On December 20, 1967, the District Court for the District of Columbia (Sirica, J.) ordered that Defendant Freeman's time for response to the Plaintiffs, Herringtons', motion for summary judgment and accompanying

papers, be extended to and including the 20th day after a ruling upon the Government motion to dismiss or stay the proceedings in *Herrington and Herrington* v. *Freeman*, and assigned said motion to dismiss or stay for hearing on January 4, 1968.

17. On December 22, 1967, the District Court for the District of Columbia (Curran, C. J.) vacated that District Court's Order of December 20, 1967, and ordered that Defendant Freeman's response to the Plaintiffs, Herringtons', motion for summary judgment and accompanying papers be filed not later than thirty days from December 22, 1967, and furthermore, that an expedited schedule thereafter be established for the hearing of the two motions at an early date.

18. The cause of action sued upon in Civil Action No. 2681-67 now pending in the United States District Court for the District of Columbia is the same cause of action as is the subject of this suit.

• • • • • •

Issued at 9:30 o'clock a.m., Jan. 16, 1968.

/s/ Wm. H. Timbers
William H. Timbers
United States District Judge
Sitting by Designation